TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

State Cases

Statutes

POINTS RELIED ON

I. THE TRIAL COURT ERRED WHEN IT GRANTED THE REQUESTED SUMMARY JUDGMENT IN FAVOR OF RESPONDENT, MID-AMERICA TRANSPLANT SERVICES, ON JUNE 14, 2002, ON THE BASIS OF APPLICATION OF §194.270, R.S.MO., AND THE IMMUNITY PROVISIONS CONTAINED THEREIN BECAUSE THIS STATUTE PROVIDES IMMUNITY IS ONLY APPLICABLE WHEN THERE IS GOOD FAITH AND LACK OF NEGLIGENCE AND GENUINE ISSUES OF MATERIAL FACT EXIST ON THE ISSUE OF THE NEGLIGENCE OF THIS RESPONDENT.

Hoover's Dairy, Inc. v. Mid-America Dairymen, Inc./Special Products, Inc., 700 S.W. 2d 426, 432 (Mo. banc 1985)

Lopez v.. Three Rivers Electric Cooperative, Inc., 26 S.W. 3d 151,156 (Mo. banc 2000)

Pierce v. Platte-Clay Electric Cooperative, Inc. , 769 S.W. 2d 769, 772 (Mo. 1989)

§194.220, R.S.Mo

§194.240, R.S.Mo

§194.270, R.S.Mo

24 Missouri Practice Appellate Practice §11.11 (2d ed.) ……..... 15

II. THE TRIAL COURT ERRED WHEN IT GRANTED THE REQUESTED SUMMARY JUDGMENT IN FAVOR OF RESPONDENTS, JEFFERSON

MEMORIAL HOSPITAL AND CHRISTOPHER GUELBERT, ON JULY 5, 2002, ON THE BASIS OF IMMUNITY PROVISIONS CONTAINED IN §194.270, R.S.MO., BECAUSE THIS STATUTE PROVIDES IMMUNITY APPLIES ONLY WHEN A PARTY ACTS WITHOUT NEGLIGENCE AND IN GOOD FAITH AND GENUINE ISSUES OF MATERIAL FACT EXIST ON THE ISSUE OF THE NEGLIGENCE OF THESE RESPONDENTS.

Barner v.. The Missouri Gaming Co., 48 SW3d 46, 50-51 (Mo. App. 2001)

Burke v.. Moyer, 621 SW 2d 75, 79 (Mo. App. 1981)

Edwards v.. Mellen, 366 SW 2d 317, 319 (Mo. 1963)

Hoover's Dairy, Inc. v. Mid-America Dairymen, Inc./Special Products, Inc., 700 S.W. 2d 426, 432 (Mo. banc 1985)

Lopez v.. Three Rivers Electric Cooperative, Inc., 26 S.W. 3d 151,156 (Mo. banc 2000)

McConnell v. Pic-Walsh Freight Company, 432 SW 2d 292, 297 (Mo. 1968)

Stanturf v. Sipes, 447 S.W. 2d 558, 561-62 (Mo. 1969)

Strickland v. Taco Bell Corp.,849 S.W. 2d 127, 132 (Mo. App. 1993)

Vintila v. Dressen, 52 SW 3d 28, 37 (Mo. App. 2001)

Wilkerson v.. Mid-America Cardiology, 908 SW 2d 691 (Mo. App 1995)

Wuerz v. Huffaker, 42 SW 3d 652,656 (Mo. App. 2001)

§194.233, R.S.Mo

§194.270, R.S.Mo

§431.069, R.S.Mo

ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT GRANTED THE REQUESTED SUMMARY JUDGMENT IN FAVOR OF RESPONDENT, MID-AMERICA TRANSPLANT SERVICES, ON JUNE 14, 2002, ON THE BASIS OF APPLICATION OF §194.270, R.S.MO., AND THE IMMUNITY PROVISIONS CONTAINED THEREIN BECAUSE THIS STATUTE PROVIDES IMMUNITY IS ONLY APPLICABLE WHEN THERE IS GOOD FAITH AND LACK OF NEGLIGENCE AND GENUINE ISSUES OF MATERIAL FACT EXIST ON THE ISSUE OF THE NEGLIGENCE OF THIS RESPONDENT.

Respondent, Mid-America Transplant Services,[1] has filed various embodiments of its argument in this case, from its Memorandum in Support of its Motion for Summary Judgment, to its Substitute Brief in this court. The argument portion of each of these memoranda/briefs contains references to numerous cases from other

[1] Appellants note Respondent, Mid-America Transplant Services, has also sometimes been referred to as Mid-America Transplant Association, Inc., including being named in the style of the case by the Court of Appeals as Mid-America Transplant Association, Inc., and being referred to throughout the text of the opinion as MTS, utilized as an abbreviation for Mid-America Transplant Services. Since briefs have been filed in this Court on behalf of Mid-America Transplant Services, Appellants will use that name throughout this brief.

jurisdictions. There are no Missouri appellate court cases interpreting the provisions of the Missouri statute on anatomical gifts at issue in this case.

The opinion of the Court of Appeals agrees a proper reading of the statute requires a potential defendant to prove it acted both without negligence and in good faith. (Court of Appeals opinion-Appendix to Substitute Brief of Respondents, Jefferson Memorial Hospital and Christopher Guelbert, pages A20-21) However, the Court of Appeals opinion appears to have accepted the conclusory statements presented by Matthew Thompson, an employee of Respondent, Mid-America Transplant Services, the Consent Form at issue in this case appeared to be valid on its face, with no limitations noted. (Court of Appeals opinion-Appendix to Substitute Brief of Respondents, Jefferson Memorial Hospital and Christopher Guelbert, p. A21) This conclusion of the Court of Appeals opinion appears to be directed only at limitations concerning the amount of bone to be removed from the body of Frank Schembre, Sr., deceased. The acceptance by the Court of Appeals of the statement no limitation appeared on the face of the Consent Form does not take into account the limitation which specifically denies consent to remove "any needed tissue."(LF 77, p. A1)

When the actual Consent Form, (a copy of which was before the trial court at the time of summary judgment, and the Court of Appeals at the time it issued its opinion) is examined carefully, it is clear the denial of consent to remove "any needed tissue" constitutes a significant limitation. (LF 77, p. A1) This limitation should have been the basis of further inquiry by all employees and representatives of Respondent, Mid-

America Transplant Services, involved in the process from that point forward, prior to removing tissue.

By removing tissue, Respondent Mid-America Transplant Services, exceeded the scope of the Consent Form, and acted negligently in doing so. The Court of Appeals listed the various activities it believed demonstrated a lack of negligence by Respondent, Mid-America Transplant Services, as follows:

> "MTS first obtained a written consent form which is permissible under §197.240.2.[2] The form was executed by a member of a class of persons authorized to consent to organ donation pursuant to §197.220.2(2). MTS presented testimony that the consent form appeared to be valid on its face with no limitations noted. Additionally, MTS offered evidence of its standard protocol when removing the eyes, bone, and tissue and testified that it followed these protocols. Finally, no one from Decedent's family contacted MTS to limit or revoke the gift which would preclude it from accepting the gift as mandated in §197.220.3. There is no evidence in the record creating a genuine issue of material fact that MTS breached its duty in the instant case. Therefore, we hold MTS acted without negligence when removing Decedent's corneas, bone, and

[2] These statutory references, although accurately copied from the text of the Court of Appeals opinion, appear to have been intended as referring to the cited sections of Chapter 194, rather than Chapter 197.

tissue." (Court of Appeals opinion-Appendix to Substitute Brief of Respondents, Jefferson Memorial Hospital and Christopher Guelbert, p. A21)

Absent from this negligence analysis is whether Respondent, Mid-America Transplant Services, negligently exceeded the scope of the written consent or failed to fully comply with its terms. It is certainly true Appellant, Thelma Schembre, did not note any specific limitations on the amount of **bone** to be taken from the body of her deceased husband. It had been explained to her at the time she signed the consent standard procedure was to only take 2-4 inches from one of the legs of the body of her deceased husband. (LF 296-304) She was not aware there was ever any intent or possibility anyone would take more than 2-4 inches, as had been explained to her at the time she signed the consent.

There was, however, certainly a limitation on the amount of **tissue**. The limitation was contained in that portion of the Consent Form which clearly indicated consent was denied for the removal of "any needed tissue." (LF 77) Appellants are unable to explain why the denial of consent to remove "any needed tissue" would not be considered a limitation on the face of the Consent to Form, as is urged by all Respondents in this case. Exceeding that limitation and taking tissue, regardless of whether it was standard procedure within the industry to do so, constitutes an act beyond the scope of consent given, and, therefore, constitutes negligence. Failing to inquire further when faced with a denial of permission to remove needed tissue, which removal is part of the standard procedure within the industry, constitutes an additional act of negligence.

This Supreme Court has held the duty of care is an objective standard determined by what an ordinary careful and prudent person would have done under the same or similar circumstances, and industry customs or standards do not establish a legal standard of care; what usually is done may serve as evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not. ***Pierce v. Platte-Clay Electric Cooperative, Inc.***, 769 S.W. 2d 769, 772 (Mo. 1989). The fact usual procedures call for removal of fascia lata tissue does not justify taking it when consent to do so is denied.

In its Substitute Brief, Respondent, Mid-America Transplant Services, presents the following argument:

> "However, plaintiffs refer to not a single fact in the record that suggests that any tissue that was obtained that would be considered "any needed tissue." The consent form does not state, as plaintiffs would have the Court believe, that "no tissues" were to be removed. MTS removed only tissues naturally associated with the removal of the "bone," specifically, the fascia lata. (Substitute Brief of Respondent, Mid-America Transplant Services, p. 13)

The logic of this argument is not easy to comprehend. The consent form specifically denies permission to remove "any needed tissue." Respondent, Mid-America Transplant Services, appears to argue the fascia lata was removed only because it was associated with removal of "bone." The representative of Respondent, Mid-America Transplant Services, in charge of bone and tissue retrieval testified, in his deposition, the

fascia lata was the **first** step of the bone retrieval process. (LF 168-169) It would seem fascia lata would then become "needed tissue."

If it is the position of Respondent, Mid-America Transplant Services, the fascia lata was not "needed tissue," then why was it taken at all? If, on the other hand, it is "needed tissue," taking it appears to be in direct violation of the terms of the Consent Form.

It is interesting to note the argument of Respondent, Mid-America Transplant Services, the definition of bone, as it is commonly used by organ procurement organizations in their procedures, includes tissue. It is argued, therefore, it was perfectly acceptable for Respondent, Mid-America Transplant Services, to remove the fascia lata tissue, because consent had been given for removal of bone. If bone equals tissue and tissue equals bone, then why, in its Organ & Tissue Procurement Manual, does Respondent, Mid-America Transplant Services, make a distinction between "bone tissue" and "soft tissue" as follows: "Bone tissue specifically includes both femurs, tibias, fibulas, iliac crests and every other rib. Soft tissue specifically includes saphenous veins, patellar tendons, Achilles tendons, **fascia** and pericardium." (LF 171-2, p. A2-3) A jury should be allowed to determine whether the explanation of Respondent, Mid-America Transplant Services, concerning the meaning of bone and tissue, and why it took tissue as having been included within the consent for bone, constitutes acting as a reasonable person would.

The jury should be allowed to determine whether the actions of an employee of Respondent, Mid-America Transplant Services, in removing this tissue, despite the

written statement on the Consent Form permission was not given for the removal of any needed tissue, constitutes negligence. A determination of the existence of negligence is peculiarly within the province of a jury. The existence of this question of material fact alone should have prevented the issuance of summary judgment in favor of Respondent, Mid-America Transplant Services. Failing to note this lack of consent for the removal of "any needed tissue," and, as a result, alter the usual process of tissue removal, or at least make some attempt to clarify the limitation, should also be considered by a jury on the issue of good faith.

A jury should be entitled to consider all of the circumstances surrounding the presentation and signing of the consent form by Appellant, Thelma Schembre, within one hour of the death of her husband. A jury should be entitled to consider the emotional impact of the death of a long-time spouse in determining whether Appellant, Thelma Schembre, should be bound by statements on the written consent form which she testified did not accurately reflect her understanding and agreement concerning removal of bone and tissue from the body of her husband, Frank Schembre, Sr. (LF 296-304)

This Honorable Court should not confine itself only to examining a checklist to determine literal compliance with procedures contained within the Uniform Anatomical Gift Act. The mere fact a signed written consent was obtained should not end the inquiry. Instead, all inquiries and analyses applicable to a negligence action should be applied. Appellants have to show a duty, breach of that duty, and foreseeability of the harm.

"Under the principles of general negligence law, whether a duty exists in a given situation depends upon whether a risk was foreseeable; foreseeability for puroses of establishing whether the defendant's conduct created a duty to the plaintiff depends on whether the defendant should have foreseen the risk in a given set of circumstances. In this setting foreseeability is forward-looking. In the context of determining proximate causation, however, foreseeability refers to whether a defendant could have anticipated a particular chain of events that resulted in injury or the scope of the risk that the defendant should have foreseen. This type of foreseeability relies upon hindsight to determine whether the precise manner of a particular injury was a natural and probable consequence of a negligent act. When it is determined that a duty exists, the concept of foreseeability is significant in evaluating the reasonableness of a particular risk in light of all the circumstances. For purposes of determining whether a duty exists, this Court has defined foreseeability as the presence of some probability or likelihood of harm sufficiently serious that ordinary persons would take precautions to avoid it…. The test is not the balance of probabilities, but of the existence of some probability of sufficient moment to induce the reasonable mind to take the precautions which would avoid it." ***Lopez v. Three Rivers Electric Cooperative, Inc.***, 26 S.W. 3d 151,156 (Mo. banc 2000) (citations to numerous other cases contained within this quotation are omitted)

In the present case, was there some probability or likelihood of harm sufficiently serious that ordinary persons would take precautions to avoid it? Respondent, Mid-

America Transplant Services, has already answered that very question in the affirmative. There was just such a probability of harm and it had taken precautions to avoid it. Unfortunately for Appellants, it had not utilized those procedures in the present case.

On this issue of foreseeability, we have the testimony of Matthew Thompson, employee of Respondent, Mid-America Transplant Services, there existed an established procedure whereby employees of Respondent, Mid-America Transplant Services, could contact the family of a deceased **immediately**, either while they were still at the hospital, or at home, by use of a recorded telephone line, in order to clarify or modify the consent given.(LF 126) The establishment of such a procedure seems to say Respondent, Mid-America Transplant Services, was aware of the possibility of unclear and uncertain consent forms, and the resultant harm which could be caused by them.

Matthew Thompson was presented with a faxed copy of the consent form and noticed it was not the usual form used by Respondent, Mid-America Transplant Services, (LF 125) It contained a scratchout from "yes" to "no" for removal of "any needed tissue."(LF 77, p. A1) The denial of consent for removal of "any needed tissue" could be interpreted by a jury as constituting a limitation on what portions of the body of Frank Schembre, Sr., were able to be removed.

At the time Matthew Thompson first reviewed his copy of the consent form, Appellants submit it was negligent on his part not to utilize the family contact procedure already established because Respondent, Mid-America Transplant Services, had foreseen the possibility of ambiguities and confusion.

In its Substitute Brief, Respondent, Mid-America Transplant Services, objects to this instance of negligence being discussed at this point, since it was not presented to the Court of Appeals. The substitute brief must raise all claims the party desires to have the Supreme Court considered, including any new issue not previously raised. ***24 Missouri Practice, Appellate Practice***, §11.11 (2d ed.). A party may not change the basis for any claim raised in the Court of Appeals, but a party may explore an issue more fully. ***24 Missouri Practice, Appellate Practice***, §11.11(2d ed)

Appellants are not attempting to change the basis for any claim raised in the Court of Appeals. Appellants are merely attempting to point out the numerous genuine material factual dispute issues overlooked by the trial court in granting its order of Summary Judgment, and a lesser number of genuine material factual dispute issues not discussed by the Court of Appeals. The primary basis of Appellants' claim remains the same, namely the presence of genuine material factual disputes on the question of negligence by Respondent, Mid-America Transplant Services, sufficient to prevent the entry of an order of Summary Judgment by the trial court. These issues are merely additional examples of genuine material factual disputes which should be presented to a jury to determine whether they constitute negligence.

Even though Respondent, Mid-America Transplant Services, argues it was completely unaware of any limitations intended by Appellant, Thelma Schembre, when she consented to donation of portions of her husband's body, it can still be held liable for negligence based on the fact its duty arises out of the relationship between the parties.

> "The judicial determination of the existence of a duty rests on sound public policy as derived from a calculus of factors: among them, the social consensus that the interest is worthy of protection; the foreseeability of harm and the degree of certainty that the protected person suffered injury; blame society attaches to the conduct; the prevention of future harm; consideration of the cost and the ability to spread the risk of loss; the economic burden upon the actor and the community-the others." ***Hoover's Dairy, Inc. v. Mid-America Dairymen, Inc./Special Products, Inc.***, 700 S.W. 2d 426, 432 (Mo. banc 1985).

In ***Hoover's Dairy***, it was held the element of knowledge was not necessary to create a defendant's duty to exercise reasonable care when installing and supervising the installation of a milking system for plaintiffs. ***Hoover's Dairy***, at 433. In the present case, even if it is accepted Respondent, Mid-America Transplant Services, had no specific knowledge of the limitation imposed by Appellant, Thelma Schembre, the duty of reasonable care could still be present, just as in ***Hoover's Dairy***.

The application of the factors set out in ***Hoover's Dairy*** above, together with the factors set out in ***Lopez***, require the conclusion Respondent, Mid-America Transplant Services, owed a duty to Appellants to ensure their specific wishes concerning donation of limited leg bone tissue were scrupulously observed. It owed the further duty to make certain the unfamiliar consent form was clarified using the procedure established for just such a situation. There was also a duty to carefully review and clarify the consent form to determine specifically why a denial of consent for "any needed tissue" was included. This is particularly significant since the person reviewing the form had specific

knowledge removal of "tissue," known as fascia lata, was a usual part of the process of removal of bone. (LF 125-7, 131-5) Failure to fulfill the duty in each of these particulars constitutes proof of a sufficient act of negligence to prevent an order of summary judgment.

Appellants do not dispute the cases considered by the Court of Appeals, from other jurisdictions, determined the issue of good faith under those states' versions of the Uniform Anatomical Gift Act, to be a question of law. However, in none of the cited cases was there a requirement for good faith to be considered in conjunction with the presence or absence of negligence.

Until recently, when Florida added a similar requirement, Missouri was the only jurisdiction requiring negligence, along with good faith, to determine entitlement to immunity. Appellants submit the determination of these courts from other jurisdictions, which hold good faith is purely a question of law, should not be considered persuasive in Missouri. Under Missouri's version of the UAGA, the issues of negligence and good faith are inextricably bound up. Therefore, these two issues should be considered together by the trier of fact.

Missouri has set itself apart from most other jurisdictions in its unique version of the UAGA, which requires an examination of the issue of negligence. Appellants submit it should likewise follow its judicial tradition of allowing issues of good faith to be decided by the jury. Missouri's courts have held good faith to be a jury question in numerous other areas of the law, as indicated by the various cases cited in Appellant's Brief in this Court. This issue of whether the actions of Respondent, Mid-America

Transplant Services, complied with the requirement of acting in good faith under the Uniform Anatomical Gift Act, should be similarly decided by a jury of Appellants' peers.

II. THE TRIAL COURT ERRED WHEN IT GRANTED THE REQUESTED SUMMARY JUDGMENT IN FAVOR OF RESPONDENTS, JEFFERSON MEMORIAL HOSPITAL AND CHRISTOPHER GUELBERT, ON JULY 5, 2002, ON THE BASIS OF IMMUNITY PROVISIONS CONTAINED IN §194.270, R.S.MO., BECAUSE THIS STATUTE PROVIDES IMMUNITY APPLIES ONLY WHEN A PARTY ACTS WITHOUT NEGLIGENCE AND IN GOOD FAITH AND GENUINE ISSUES OF MATERIAL FACT EXIST ON THE ISSUE OF THE NEGLIGENCE OF THESE RESPONDENTS.

Respondents, Jefferson Memorial Hospital and Christopher Guelbert, have cited numerous cases from other jurisdictions within their Substitute Brief, just as they did when their initial Motion for Summary Judgment was presented to the Trial Court. In none of the cited cases is there any interpretation of a statute which includes, as the statute in Missouri does, a requirement for freedom from negligence **and** good faith. All of these cited cases are, therefore, still inapplicable to the facts of the present case.

Respondents, Jefferson Memorial Hospital and Christopher Guelbert, argue Appellants failed to present any facts to the Trial Court about their failure of compliance with §194.233.1, RSMo, which requires Respondent, Jefferson Memorial Hospital, to designate a trained person to request all anatomical gifts. (Substitute Brief of Respondents, Jefferson Memorial Hospital and Christopher Guelbert, p.11) In their Memorandum in Opposition to the Motion for Summary Judgment of Respondents,

Jefferson Memorial Hospital and Christopher Guelbert, Appellants did argue the applicability of the terms of that statute. (LF 294)

In that Memorandum, Appellants also argued the significance of the deposition testimony of Sherry Bramlett, (Director of Patient Care Services at Respondent, Jefferson Memorial Hospital, at the time of this incident), she did not know whether Respondent, Christopher Guelbert, was a "designated requester" at the time of these occurrences in November, 1998. (LF 294) This argument was presented to the Trial Court prior to the time it ruled on the Motion for Summary Judgment of Respondents, Jefferson Memorial Hospital and Christopher Guelbert. (LF 328-9) It can now be properly argued to this Court. ***Barner v. The Missouri Gaming Co.***, 48 S.W.3d 46, 50-51 (Mo. App. 2001)

While it is correct no allegation of "negligence per se" was included in the petition filed by Appellants, this argument by Respondents, Jefferson Memorial Hospital and Christopher Guelbert, overlooks the rule of law which states a statute can create a duty or fix a particular standard of care, and the failure to observe such duty or standard of care constitutes a prima facie case of negligence for the jury. ***Edwards v. Mellen***, 366 SW 2d 317, 319 (Mo. 1963)

The failure to include a specific allegation of negligence per se within the petition may prevent Appellants from submitting that issue to the jury by way of instruction during trial. However, the failure of Respondents, Jefferson Memorial Hospital and Christopher Guelbert, to comply with a statute can still serve as proof of negligence for the consideration of the jury at the time of trial. ***Vintila v. Dressen***, 52 S.W. 3d 28, 37 (Mo. App. 2001); ***Burke v. Moyer***, 621 S.W. 2d 75, 79 (Mo. App. 1981). Similarly, this

failure to comply with a statute can, and should, be considered by this Honorable Court as further indication of error by the Trial Court in failing to find sufficient proof of acts of negligence to avoid summary judgment. ***McConnell v. Pic-Walsh Freight Company***, 432 S.W. 2d 292, 297 (Mo. 1968)

Respondents, Jefferson Memorial Hospital and Christopher Guelbert, analogize Appellants' cause of action to informed consent for medical or surgical treatment. (Substitute Brief of Respondents, Jefferson Memorial Hospital and Christopher Guelbert pp.12-14) A claim for lack of consent for medical or surgical treatment can be based on lack of informed consent or lack of any consent. ***Wuerz v. Huffaker***, 42 S.W. 3d 652, 656 (Mo. App. 2001). If a physician obtains a patient's consent, but the patient claims that physician failed to make an appropriate disclosure of risks and benefits, the action is in the nature of medical malpractice based on the physician's negligence in failing to meet a recognized standard of care in obtaining his patient's consent by providing sufficient disclosure of the risks or alternatives to the treatment. ***Wuerz***, at 656.

In cases based on lack of "informed consent" in connection with surgical and medical procedures, there is always a physician who performs or oversees the procedure and who, according to case law, maintains the ultimate responsibility of responding to the patient's questions or inquiries about the risks and alternatives to that contemplated surgical procedure. In the present situation, there was no person, other than Respondent, Christopher Guelbert, who had the ultimate responsibility for responding to questions and providing information to the donor's family.

Respondent, Christopher Guelbert, was not acting in the traditional role as a nurse merely handing a clipboard to a surgeon's patient prior to surgery in order to obtain a signature on a surgical consent form. Respondent, Christopher Guelbert, stepped beyond that role and assumed the role mandated by statute as a "trained requester" to make contact with a potential donor family, and to answer their questions completely and accurately. As such, he alone bore the final responsibility to act in a manner free from negligence throughout his contact and discussion with that family.

Merely obtaining a signature on the written consent form, after a surgeon has already fully and accurately explained the procedure to a patient, is not all that is required in this situation. As stated in ***Lopez v. Three Rivers Electric Cooperative, Inc***., 26 S.W. 3d 151, 156 (Mo. banc 2000) and ***Hoover's Dairy, Inc. v. Mid-America Dairymen, Inc./Special Products, Inc.***, 700 S.W. 2d 426, 432 (Mo. banc 1985), there existed an independent duty on the part of Respondent, Christopher Guelbert, to act reasonably because of the special relationship between him and the family depending upon his actions and information to be accurate.

The concept of the necessity of "informed consent" in the context of preparation for surgical procedures may be analogous, but is not identical, to the present situation in which it is alleged Appellant, Thelma Schembre, and her children, Appellants, Bobby Joe Schembre and Laurie Laiben, were not only given insufficient, but incorrect, information prior to requesting them to make a decision to consent to donation of parts from the body of their deceased family member. The analogy does not extend to the requirement for expert testimony about the standard of care necessary to make a

submissible case of informed consent, as required when the consent is for surgical or medical treatment. No case, Missouri or other jurisdictions, has imposed such a requirement. In the present case, Judge Kramer specifically held, when he overruled a motion to dismiss, filed by Respondent, Jefferson Memorial Hospital, no health-care affidavit or determination of merit by an expert health-care provider was required. (LF 52)

Respondents, Jefferson Memorial Hospital and Christopher Guelbert, argue the case of ***Wilkerson v. Mid-America Cardiology***, 908 S.W. 2d 691 (Mo. App. 1995), is authority for the proposition a written consent always controls and overrules a family's understanding of the scope of consent. (Substitute Brief of Respondents, Jefferson Memorial Hospital and Christopher Guelbert p. 13) In the ***Wilkerson*** case, the trial court granted a directed verdict because defendants argued plaintiff did not offer proof of what he would have done if he had received proper disclosure of all the risks and benefits of the various alternative medical procedures. The appellate court held it was not necessary to present testimony of a subjective nature, of what that specific plaintiff would have done, but, rather an objective standard applied, and the applicable question is: what would a reasonable person have done under the same circumstances, if that reasonable person had received full disclosure of alternatives; ***Wilkerson***, *at 696-7*. The reasoning and specific legal issues involved in ***Wilkerson*** are not applicable to the present analysis.

In the present case the question is based on a foreseeability of harm and breach of duty of reasonable care in light of what was foreseeable, as discussed at length in ***Lopez*** . Was there a foreseeable risk in the situation involving Respondent, Christopher Guelbert,

making contact with Appellants, as a potential donor family? Appellants submit the answer is yes. The Missouri Legislature recognized the risk of having untrained people making such requests, and, therefore, included a requirement anyone making such request must be trained to do so. §194.233.1. Did Respondent, Christopher Guelbert, himself, recognize there was a risk involved in him presenting information to Appellants? Appellants submit the answer is yes, and they presented deposition testimony he sought out an additional employee of Respondent, Jefferson Memorial Hospital, to respond to specific inquiries from Appellants. (LF 301-04)

Respondents, Jefferson Memorial Hospital and Christopher Guelbert, point out in their Substitute Brief Appellants did not include specific page references in their Brief to point this Court to the portions of the Legal File which demonstrate a significant dispute as to the material facts of the conversation that occurred between Respondent, Christopher Guelbert, and Appellants, Thelma Schembre, Bobby Joe Schembre, and Laurie Laiben, on November 28, 1998, immediately after the death of Frank Schembre, Sr. Appellant's counsel failed to take advantage of the opportunity to file a Substitute Brief in this Court for reasons based entirely on overwhelming stupidity. Appellant's counsel again finds himself in the position of seeking the Court's pardon for failing to provide those legal file references and repeating the mistake by utilizing the original brief instead of a substitute brief.

Appellants respectfully request this Honorable Court to please note the deposition testimony of Appellant, Thelma Schembre, which details her recollection of the discussion between her, her family, and Respondent, Christopher Guelbert. (LF 297-309)

Please further note the deposition testimony of Appellant, Bobby Joe Schembre, which details his recollection of the discussion between his family and Respondent, Christopher Guelbert. (LF 311-323) Please also note the deposition testimony of Appellant, Laurie Laiben, which details her recollection of the discussion between her family and Respondent, Christopher Guelbert, on November 28, 1998. (LF 324-325) Please compare the recollections of that same conversation by Respondent, Christopher Guelbert, contained in his deposition testimony. (LF 218-233) Appellants again submit, as found by the Court of Appeals, these accounts demonstrate genuine material disputes of fact sufficient to prevent summary judgment.

The argument is made by Respondents, Jefferson Memorial Hospital and Christopher Guelbert, there are no facts adduced, nor can there be facts adduced, that Respondent, Christopher Guelbert, violated §194.233.1, R.S. Mo. The terms of this statute prevent him from being a designated requester if he was "connected with the determination of death."

Several portions of the Legal File detail the connection to the emergency room of Respondent, Christopher Guelbert, treatment of Frank Schembre, Sr., and the eventual determination of his death. In his deposition testimony concerning his role in the medical care immediately preceding the death of Frank Schembre, Sr., Respondent, Christopher Guelbert, testified: he was the recorder for the cardiac resuscitation in the trauma room; (LF 214); he was the nurse responsible for filling out the nurses' notes and the code blue sheet, on which the drugs given and procedures done during the resuscitation effort are recorded; (LF 214); the entire triage and assessment nursing record, nurses' notes, and

IV solution information was filled out by him; (LF 215); these included statements in the record the patient had expired; (LF 73-4); there was an unwritten rule if you were the recorder for the cardiac resuscitation of a particular patient, it was considered your patient (LF 215).

Appellants respectfully submit if you are actively involved in a resuscitation effort of a heart attack patient in an emergency room, you fill out all paperwork connected with that resuscitation effort, you record all procedures done and all medications administered throughout the resuscitation effort leading up to the death of the patient, it raises a jury question of whether you are "connected" to the determination of death of the patient.

It should be noted the statute does not demand only the physician who actually made the determination of death is prevented from serving as the designated requester. The statute only requires a "connection" with the determination of death to be disqualified. The various pages of the medical record referred to by Respondent, Christopher Guelbert, are found within the Legal File and were presented for consideration to the Trial Court prior to entry of its Summary Judgment order. (LF 200-205) To argue this evidence does not raise a disputed issue of material fact as to whether he was "connected with the determination of death," for purposes of the applicability of §194.233.1, R.S. Mo, ignores the various documents from the Legal File.

The Missouri Nurses Association has filed an Amicus Curiae brief in support of Respondent, Christopher Guelbert. In its brief, the Missouri Nurses Association argues there is no duty on the part of a nurse to obtain "informed consent" for procedures performed by physicians and others. (Brief of Amicus Curiae Missouri Nurses

Association, p. 2) Appellants have no quarrel with the numerous cases cited by the Missouri Nurses Association in support of that proposition.

However, Appellants submit that proposition misstates the central question in the present case. This is the same argument advanced by Respondents, Jefferson Memorial Hospital and Christopher Guelbert, and, as such, has been responded to by Appellants earlier in this brief, but will be addressed further in the following paragraphs

This is not a situation in which Respondent, Christopher Guelbert, was attempting to obtain a signature on a consent form for an anticipated surgery to be performed by some physician. This is a situation expressly covered by a statutory procedure which requires all hospitals to designate a "trained person" to request anatomical gifts. §194.233.1, R.S. Mo. On the evening of November 28, 1998, when he spoke with Appellant, Thelma Schembre, and her son and daughter, Respondent, Christopher Guelbert, was not functioning in the capacity of a nurse performing pre-surgical paperwork. He was, instead, assuming the statutory duty, as a "trained person," to request anatomical gifts from the family of a potential donor. None of the cases cited by the Missouri Nurses Association in its brief deals with a corresponding factual scenario.

A duty may be imposed by the Legislature or the common law based on the relationship between the parties. ***Strickland v. Taco Bell Corp.,*** 849 S.W. 2d 127, 132 (Mo. App. 1993). In 1969, this Supreme Court adopted §323 of the Restatement (Second) of Torts, which imposes a duty on those who voluntarily or for consideration render services to another. ***Stanturf v. Sipes***, 447 S.W. 2d 558, 561-62 (Mo. 1969). That section of the Restatement provides as follows:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other's reliance upon the undertaking. ***Strickland***, at 132.

To allow requests for organ or tissue donation to be made, without imposing a corresponding duty to provide accurate information to family members from whom such requests are made, and to otherwise act with reasonable care, would render the Uniform Anatomical Gift Act, and the procedures contained within it, meaningless.

The Missouri Nurses Association gives its prediction if a duty is found for Respondent, Christopher Guelbert, and other nurses acting as designated requesters, to act without negligence when obtaining consent from family members for tissue donation, organ donations in Missouri will be uncertain and thrown into chaos. (Brief of Amicus Curiae Missouri Nurses Association, p. 7) Although Appellants are not skillful at predicting the future, Appellants wonder what the impact upon such donations would be in Missouri if it became generally known among the public they can not rely upon hospital representatives to give them accurate information about what is to be done to the bodies of their loved ones, and cannot rely upon statements from them concerning the amounts of various bones and tissue which are to be cut out of these bodies.

The public in general appears to be favorably disposed towards the issue of **organ** donation. The public understands if consent is given for donation of a particular **organ**,

that **organ** has to be removed from the body. However, when generic terminology such as "bone" or "tissue" is used, Appellants did not understand, and do not believe the general public understands, the meaning of those terms as they are used within the organ procurement industry. Appellants do not believe the general public has a proper conception of the extent of bone to be removed from the body of a loved one if such consent is given. When the Missouri Nurses Association argues, as it does here, there should be no accountability for providing incorrect information, and no requirement to act as a reasonable person would under the same circumstances, it appears to be contrary to all legal standards relating to negligence actions. When it is argued there is no requirement to provide accurate information in response to questions from family members about what is meant when the terms "bone" or "tissue" are used, it appears to be contrary to the portions of the Restatement (Second) of Torts adopted by this Court. When it is argued written consent for removal of "bone" or "tissue" from the body of a deceased loved one is the ultimate and only goal, and no inquiry is permitted into whether that written consent was obtained with or without negligent misstatements, that does not comply with the universal application of the reasonable man standard in negligence cases.

An additional Amicus Curiae Brief has been filed by the Missouri Hospital Association in support of Respondents, Jefferson Memorial Hospital and Christopher Guelbert. The Missouri Hospital Association argues Appellants have alleged no facts to show negligence or bad faith on behalf of Respondents, Jefferson Memorial Hospital and Christopher Guelbert. Appellants submit they have alleged just such negligent acts. (LF

13-22) Appellants further submit they have presented proof of the existence of sufficient genuine factual disputes sufficient to prevent the entry of the Summary Judgment order by the Trial Court. (LF 159-172, 288-329) The Court of Appeals has agreed with this assessment. (Court of Appeals Opinion-Appendix of Substitute Brief of Respondents, Jefferson Memorial Hospital and Christopher Guelbert, pp. A 15-25)

The Missouri Hospital Association includes in its Amicus Curiae Brief a whole host of horrible consequences it argues will ensue if Appellants are allowed the opportunity to pursue a remedy for the negligence of Respondents, Jefferson Memorial Hospital and Christopher Guelbert. It states such a result would make the process for hospitals to obtain organ donations more complex. Appellants submit a simple reasonable process is already in place, but it was not followed correctly in the present situation. If the process of designating a trained person to request the donor family's consent had been followed, there would be no necessity for this present lawsuit. If accurate information from this trained requester had been provided, there would be no necessity for this present lawsuit.

If the last several pages of the Amicus Curiae Brief of the Missouri Hospital Association are to be believed, then allowing Appellants to proceed with their lawsuit would result in the following: increased cost of health care to all Missourians; reduction of the availability of affordable health care to all Missourians; closure of Missouri hospitals; adverse impacts upon the relationship of hospitals with managed care organizations; reduction in access to hospitals in rural areas of Missouri; our entire health care system will be placed at risk.(Amicus Curiae Brief of Missouri Hospital Association,

pp. 9-11) While Appellants do not want to be responsible for causing any of these results, Appellants respectfully submit, if any of this parade of horrible results actually occurs, it will not be due to the fact this Honorable Court allowed them, or any other potential injured parties, the opportunity to seek redress for negligence under the UAGA.

In reciting this list of adverse consequences, is the Missouri Hospital Association arguing hospitals should not be held responsible for the negligent acts of their employees because they cannot afford it or it will increase the cost of their product, namely, health care? If similar arguments were directed to all negligence cases, then automobile drivers, property owners, fast food restaurants, or any other group of potential defendants would be entitled to make similar arguments, and, thereby, avoid liability. This is not the law of Missouri or any other state.

Respondents, Jefferson Memorial Hospital and Christopher Gilbert, in the argument portion of their Substitute Brief, appear to argue this Honorable Court cannot look beyond whether a signed consent form was obtained. If that were truly the intent of the Legislature, and if the process for obtaining a written consent would not have to include an accurate explanation of the body parts to be removed, then it would be a much better practice for any hospital or health-care provider to have a blanket written consent form signed for all patients as they are admitted to the hospital. If neither the patient, nor any member of his family, is entitled to understand the terms or details of the consent, why not insist someone sign this blanket consent without explanation or question along with all other admission forms required at the time of entry into a hospital or emergency room? If the argument of Respondents, Jefferson Memorial Hospital and Christopher

Guelbert, is to be accepted, there is no need to answer any question about specific body parts to be taken, because all that is necessary is the **signature** of a listed family member. Misstatements concerning the amounts of particular body parts to be taken are immaterial, so long as the nurse or hospital comes away with a **signed** form.

Additionally, if this argument is accepted, the terms used on such a consent form, and their meaning in the everyday world of the person asked to sign the form, are irrelevant. Bone equals tissue and tissue equals bone. Denial of permission for "any needed tissue" is the equivalent of granting permission to remove "any needed tissue", as long as there has been a signature affixed to the consent form.

Respondents, Jefferson Memorial Hospital and Christopher Guelbert, argue in their brief (Substitute Brief, p. 22), the clear intent of the Legislature was to require Missouri's UAGA to be construed so as to effectuate its general purpose to make uniform the law of those states which have enacted it. Within a few pages of this statement, these same Respondents inform this Honorable Court, in 2002 the State of Florida added a provision requiring freedom from negligence, along with good faith in order to obtain immunity from liability, just as Missouri has had for more than 30 years. It also tells us the State of Idaho, in its enactment of its own version of the Uniform Anatomical Gift Act, includes a specific requirement for informed consent, and goes on to specify exactly what information must be communicated to the potential donor.

Should Missouri interpret its version of the UAGA to comply with the requirements of these two states? Or should Missouri only seek to interpret its version of the Uniform Anatomical Gift Act to comply with those versions of the statute from the

other 47 states, which would allow all Respondents in this case to be found immune from liability based on their good faith alone?

Missouri appears to have meant what it said in this statute, rather than somehow having included the phrase "without negligence" inadvertently, as appears to be argued herein by all Respondents and Amicus Curiae in this case. §431.069, R.S. Mo., deals with a similar activity, namely: procuring, processing, distributing, and using blood and plasma. This statute also specifically refers to "... other human tissues, including but not limited to corneas, bones, hearts or other organs for the purpose of injecting, transfusing or transplanting any of them into the human body…." This statute specifically declares these activities to be considered the rendition of a service, rather than a sale. Because these activities are statutorily declared to be a service rather than a sale, the intent appears to be to remove such activities from becoming a basis for a product liability lawsuit, and, thereby, avoiding the imposition of strict liability. However, the last sentence of that statute states as follows: "Nothing herein shall relieve any person, firm or corporation from negligence." §431.069, R.S. Mo.

This statute is not included within or related to the Uniform Anatomical Gift Act, and is sometimes referred to as the Missouri Blood Shield Statute. It specifically mentions the procurement, processing, distribution and use of ***corneas***, ***bones***, hearts and other organs (emphasis added) §431.069, R.S. Mo. The Missouri Legislature apparently felt the need to emphatically restate the applicability of regular common law negligence rules and analyses to these activities so any argument the universal rules relating to negligence ought not to apply to such activities would be clearly refuted. These

activities, including procurement, processing, distribution and use of ***bones*** are precisely the activities also dealt with in the Uniform Anatomical Gift Act. If the Missouri Legislature says twice, in two separate statutes, negligence law remains applicable to anyone engaging in these activities, does it not then become clearer to all persons analyzing the Uniform Anatomical Gift Act this is what the Legislature did, in fact, intend? What could the Legislature have said in §194.270, R.S. Mo., of the Uniform Anatomical Gift Act which would have made it clearer the general rules of negligence must be applied whether good faith was also present?

If, as Respondents, Jefferson Memorial Hospital and Christopher Guelbert, seem to argue in their brief, the standards to be used to analyze and judge the presence or absence of negligence should be only the barest literal compliance with those procedures outlined in the UAGA, rather than the general rules applicable to all other negligence actions, would not the Legislature have stated it more clearly than it did?

CONCLUSION

Sufficient proof was presented to the Trial Court to demonstrate the existence of genuine disputed issues of material fact on the issue of negligence of all Respondents. Since Respondents must demonstrate the presence of good faith and the absence of negligence in order to obtain the benefits of the statutory immunity contained within §194.270, R. S. Mo., the existence of these disputed issues of material fact should have prevented the Trial Court from entering Summary Judgment in favor of any Respondent. Appellants respectfully request this Honorable Court to reverse that portion of the opinion of the Court of Appeals which held Summary Judgment was proper for Respondent, Mid-America Transplant Services, and allow trial preparation proceedings to continue. Appellants also respectfully request this Honorable Court to affirm that portion of the Court of Appeals opinion which held summary judgment was not properly granted for Respondents, Jefferson Memorial Hospital and Christopher Guelbert, and similarly allow trial preparation proceedings to continue against them.

CERTIFICATE OF SERVICE

I hereby certify, in accordance with Rule 84.05(b) Supreme Court Rules, 2003 ed., that the original and 10 copies of APPELLANTS' SUBSTITUTE REPLY BRIEF with a floppy disk in the above-entitled cause was filed this 17th day of December, 2003, with the Clerk of the Supreme Court, State of Missouri, and 2 copies of the entire SUBSTITUTE REPLY BRIEF with a floppy disk was mailed, postage pre-paid addressed to Edward S. Meyer, Rabbit, Pitzer & Snodgrass, Attorney for Respondent, Mid-America Transplant Services, 100 S. Fourth Street, 4th Floor, St. Louis, Missouri, 63102; Randall D. Sherman, Wegmann, Gasaway, Stewart, Schneider, Dieffenbach, Tesreau & Sherman, P.C., Co-Counsel for Respondent, Jefferson Memorial Hospital, 455 Maple Street, Hillsboro, Missouri, 63050; Kenneth C. Brostron, Judith Brostron, Lashley & Baer, P.C., Attorneys for Respondent, Jefferson Memorial Hospital and Christopher Guelbert, 714 Locust, St. Louis, Missouri, 63101; Joanne E. Joiner, Gerald M. Sill, Attorneys for Amicus Curiae Missouri Hospital Association, P.O. Box 60, Jefferson City, MO 65102-0060; and Richard D. Watters, Chad M. Moore, Attorneys for Amicus Curiae Missouri Nurses Association , 714 Locust Street, St. Louis, MO 63101.

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CERTIFICATE OF COMPLIANCE

I hereby certify this Substitute Reply Brief contains all information required by Rule 55.03, Supreme Court Rules 2003, ed.; it complies with the limitations contained in Rule 84.06, Supreme Court Rules, 2002 ed.; it contains 8,536 words, in Microsoft Word for Windows 2000 format; is printed in 13-point proportionally-spaced type (Times New Roman), the disk provided has been scanned for viruses and is virus-free.

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Appendix Table of Contents